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Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

*Filed electronically via ECFS*

Re: *Restoring Internet Freedom*, WB Docket No. 17-108

Dear Ms. Dortch:

New America's Open Technology Institute, by its attorneys, the Institute for Public Representation, comments on the by the Federal Communications Commission ("FCC" or "Commission") to rely on the impossibility exception as the legal basis for preempting state laws governing the intrastate practices of broadband providers.

As an initial matter, any preemption in the final order would be procedurally deficient in violation of the Administrative Procedure Act because the Commission failed to provide adequate notice of its intent to preempt and the basis for its preemption. The Commission's purported authority to preempt, the impossibility exception, is a fact-intensive determination that, if justified, allows agencies to exercise *narrow* preemption authority of state laws and regulations that govern activities that are purely interstate or impossible to separate from intrastate activities. At this point, the public lacks a full understanding of the facts needed to make this determination. The facts currently at the public's disposal, however, dictate that the Commission does not have authority to preempt.

## **I. The Commission’s preemption authority is strictly limited by Section 152(b).**

As a first matter, “Section 152(b) constitutes . . . a congressional denial of power to the FCC”<sup>1</sup> prohibiting “the Commission[’s] jurisdiction with respect to . . . charges, classifications, *practices*, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier.”<sup>2</sup> It effectively “fences off from FCC reach or regulation intrastate matters,” even when the intrastate matters are done in connection with the interstate matters<sup>3</sup> and when facilities are physically inseparable.<sup>4</sup> The FCC cannot “nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself.”<sup>5</sup> Notably, “[t]he extent of the authority to regulate intrastate communications services reserved to the states . . . does not turn on whether the services are provided on a common carrier or non-common carrier basis”<sup>6</sup>

Contrary to the Commission’s claim in the draft order, it cannot engage in wholesale preemption of state broadband laws without an express preemption provision or unambiguous command from Congress. The provisions of the Telecommunications Act of 1996 are “subject to the substantive and interpretative limitations of Section 152(b)”<sup>7</sup> and “should not be read to confer upon the FCC jurisdiction over [intrastate activities] unless [the provisions are] ‘so unambiguous or straightforward so as to override the command of § 152(b).’”<sup>8</sup> No provision in the Act expressly provides for the Commission to preempt all state laws related to the practices of broadband providers. The draft order suggests that the passage of the 1996 Act and its policy statement laying out the general purpose of the Act constitute an unambiguous command from Congress.<sup>9</sup> They do not.

## **II. The impossibility exception provides for only narrow preemption authority.**

Even if the Commission is unconvinced of its lack of authority to preempt, the impossibility exception will not save it. Under the impossibility exception, the FCC may preempt state laws when “(1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a *valid* federal regulatory objective,”<sup>10</sup> and it must also justify its entire preemption order by “demonstrating that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals.”<sup>11</sup> It

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<sup>1</sup> Louisiana Pub. Serv. Comm’n v. FCC (“Louisiana PSC”), 476 U.S. 355, 374 (1986).

<sup>2</sup> 47 U.S.C. § 152. (emphasis added).

<sup>3</sup> Louisiana PSC at 370.

<sup>4</sup> Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC (“NARUC III”), 880 F.2d 422, 428 (D.C. Cir. 1989).

<sup>5</sup> Louisiana PSC at 374 (1986).

<sup>6</sup> People of State of Cal. v. FCC (“California I”), 905 F.2d 1217, 1242 (9th Cir. 1990).

<sup>7</sup> Illinois Pub. Telecommunications Ass’n v. FCC, 117 F.3d 555, 561 (D.C. Cir. 1997).

<sup>8</sup> *Id.* at 561 (D.C. Cir. 1997) (quoting Louisiana PSC at 377).

<sup>9</sup> Draft Order at ¶¶ 198-99.

<sup>10</sup> Minnesota Pub. Utilities Comm’n. v. FCC, 483 F.3d 570, 578 (8th Cir. 2007) (emphasis added).

<sup>11</sup> California I at 1243.

is not enough merely to show that “some of the preempted state regulation would, if not preempted, frustrate FCC regulatory goals.”<sup>12</sup>

**A. Certain aspects of broadband service can easily be separated into interstate and intrastate.**

The Commission cites several FCC orders and a couple cases as the basis for asserting that broadband is jurisdictionally interstate.<sup>13</sup> To its credit, the Commission is right that these sources show that when a broadband-based activity travels across state lines or when it is impossible to determine whether the traffic is travelling across state lines, it is jurisdictionally interstate. However, when the facts of these orders and cases are read closely, they demonstrate that when a broadband provider can determine that the start and end points of an activity occur only within a state, it is possible to separate the interstate and intrastate aspects of the service, and thus the impossibility exception would not apply under the first prong.

Certain state laws that govern the relationship between an ISP and its customers within a state cannot be preempted under the impossibility exception. Unlike some of the situations in the sources cited in the draft order, the beginning and end points of the interaction between the customer and the ISP can be easily identified and are both within the state—the device the customer uses to access the ISP’s network and the closest ISP headend, tower, or other facility to the customer where the ISP can collect information from the customer and can manipulate the customer’s broadband service. In this case, it would be quite easy for an ISP to comply with the particular state laws without having to apply the same requirements to its interstate communications.

**B. The FCC cannot have a valid federal policy goal when it disclaims all authority over broadband practices.**

The draft order’s reliance on the impossibility exception also falls apart because it fails to acknowledge that preemption by the Commission must be pursuant to a *valid* federal policy goal. But any goal the Commission asserts is invalid because the order disclaims its general authority to regulate the practices of broadband providers at all. According to the draft order’s own terms, once broadband is classified as an information service, the FCC lacks authority to impose any conduct rules on ISPs.<sup>14</sup> The Commission cannot thereafter assert that it has a policy goal of removing regulations for something over which it has no authority. By way of analogy, if the FCC were to issue an order stating that it does not have authority to regulate food safety, it would defy logic for it to claim it has a policy of deregulating food safety measures. Once the FCC decides to abdicate authority, it extracts itself from any oversight and precludes itself from preempting state efforts on similar issues.

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<sup>12</sup> California I at 1243; *see also* NARUC III at 430 (D.C. Cir. 1989) (“We conclude, therefore, that the Commission may take appropriate measures in pursuit of that goal, but only to the degree necessary to achieve it.”).

<sup>13</sup> Draft Order at ¶ 195.

<sup>14</sup> *Id.* at ¶ 263.

**C. Complete preemption does not meet the narrow tailoring requirement of the impossibility exception.**

The Commission has not met its burden of justifying that its preemption approach is narrowly tailored. As discussed above, it is not difficult to imagine state laws that purely govern the intrastate activities of ISPs and their customers. A preemption approach cannot be narrowly tailored if it does not account for these possibilities. In fact, a Ninth Circuit decision suggests that courts are wary of broad sweeping preemption.<sup>15</sup> Thus, the Commission should exercise caution in preempting all state laws governing broadband providers.

**III. Section 10(e) does not support preemption.**

Finally, it is worth noting that, especially absent other valid preemption authority, the Commission cannot hang its hat on Section 10(e) of the Act. The Commission only relies on this provision for “support,” but even still, it is unavailing for the same reason that the Commission’s policy goals fail. Forbearance from exercising authority is different from disclaiming any authority in the first place.

Respectfully submitted,

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<sup>15</sup> California I at 1239-43 (vacating the Commission’s attempt to preempt “nearly all state regulation of the sale of enhanced services by communications common carriers”).